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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 82

HIRAM W. MORRIS, JR.,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

RICHARD KANNER
Counsel for Petitioner
1150 N. W. 14th Street
Miami, Florida

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

HIRAM W. MORRIS, JR.,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

I.

Petitioner requests this Court to issue a writ of certiorari to the Florida District Court of Appeal, Fourth District, to review its separate unreported orders entered in case numbers 1340 and 1461 on March 8, 1968, certiorari denied by the Florida Supreme Court without opinion on April 20, 1968, case numbers 37204 and 37205. Jurisdiction is conferred upon this Court by Title 28, U.S.C., Sec. 1257.

II.

QUESTION OF LAW

Is it a denial of due process to dismiss petitioner's criminal appeal for lack of prosecution by petitioner's retained counsel, when no personal notice was given to petitioner of such intent, and when, upon notification of the dismissal, petitioner immediately retained new counsel and offered to proceed?

III.

STATEMENT OF FACTS

Petitioner's retained trial counsel filed notices of appeal from convictions arising in two separate unrelated cases. Petitioner subsequently retained new counsel to represent him on appeal, but unknown to petitioner, his appeals were not prosecuted, and upon motions of the Attorney General, both appeals were dismissed for lack of prosecution. Neither his trial counsel, who entered his appearance by virtue of the notice of appeal, nor his appellate counsel (who entered no appearance) advised petitioner of their withdrawal from the case, or of the state's motion to dismiss, nor was petitioner so advised by the Attorney General or the clerk of the District Court of Appeal.

Upon notification of the dismissal by his bondsman, petitioner immediately moved to substitute counsel and to reinstate his appeal. The factual allegations above were incorporated in his motion and sworn to (App. A1). The clerk of the court invited opposing affidavits from appellant's trial counsel and appeal counsel (App. A2), but none were filed.

The District Court denied the motion to reinstate the appeal (App. A3), and the Florida Supreme Court denied certiorari.

IV.

RECORD ON APPEAL

The following certified record accompanies, and is filed with, this petition.

1. The notice of appeal in case numbers 1340 and 1461.

2. The state's motion to dismiss the appeal in case numbers 1340 and 1461.

3. The order granting the motion to dismiss in case numbers 1340 and 1461.

4. The motion to recall mandate and reinstate the appeal filed in case numbers 1340 and 1461.

5. The letter from the clerk of the district court inviting opposing affidavits in case numbers 1340 and 1461.

6. Order denying the motion to reinstate appeal in case numbers 1340 and 1461.

V.

ARGUMENT

The constitutional right to an *effective* appeal has been recognized by this Court in cases culminating in *Anders* v. *California*, 386 U.S. 738 and *Entsminger* v. *Iowa*, 386 U.S. 748. For this Court to deny certiorari from the order denying petitioner's motion to reinstate his appeal would in effect sanction an anomalous situation where an indigent defendant would have greater protection than an affluent defendant.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD KANNER
Counsel for Petitioner
1150 N. W. 14th Street
Miami, Florida

(Caption Omitted)

Motion to Recall Mandate and Reinstate Appeal
Motion to Substitute Counsel

HIRAM W. MORRIS, JR., would show unto this court that this appeal was dismissed on motion by the state for failure to prosecute on January 12, 1968.

That subsequent to the filing of the notice of appeal, he had retained John E. McCarey, Esq., of Cocoa Beach, Florida, to prosecute this appeal in his behalf, that he has satisfied all financial responsibilities requested by Mr. McCarey; that Mr. McCarey has never advised him that this appeal was not being prosecuted, nor has he been advised by Mr. McCarey, the attorney general, or the clerk of this court, of the state's motion to dismiss this appeal for failure to prosecute.

He initially learned of the dismissal from his bondsman on Thursday, February 8, 1968, and his attempts to speak with Mr. McCarey since that time have been futile.

He believes his appeal is meritorious, and has retained Richard Kanner, Esq., to represent him in such further proceedings as may be necessary.

The court still retains jurisdiction over this cause, under the ruling of Chapman v. St. Stephens Protestant Episcopal Church, 138 So. 630 (Fla. 1932), that the appellate court retains jurisdiction over all matters until the end of the term.

WHEREFORE, he prays:

1. That the mandate issued in this cause be recalled, and his appeal be reinstated, and he be allowed within a

day certain to be set by this court to file such briefs and pleadings as may be advisable.

2. That Richard Kanner be granted leave to represent him in further proceedings.

(Signature omitted.)

(Jurat omitted.)

DISTRICT COURT OF APPEAL

Fourth District
P. O. Box 1449
Vero Beach, Florida 32960

February 14, 1968

Richard Kanner, Esq.
609 Professional Arts Center
1150 N. W. 14th Street
Miami, Florida

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Stuart, Florida

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Assistant Attorney General
P. O. Box 640
Vero Beach, Florida

John E. McCarey, Esq.
Box 381
Cocoa Beach, Florida

Re: Hiram W. Morris, Jr. v. State—Appeal No. 1340
Hiram W. Morris, Jr. v. State—Appeal No. 1461

Gentlemen:

Appellant's motion to recall mandate and reinstate appeal and motion to substitute counsel, filed February 14, 1968 in the above appeals, will be submitted to the court on Thursday, March 7, 1968. Florida Appellate Rule 3.9(d).

If all interested parties file and serve written waivers of oral argument, the court will consider the motions in conference on such records, briefs and affidavits as have

been timely submitted in accordance with F.A.R. 3.6(k), 3.9(e) and 3.9(g).

In the absence of waivers by all interested parties, counsel desiring to offer oral argument for or against the motions will be given an opportunity to do so at 9:30 AM at City Hall, Vero Beach. F.A.R. 3.9(d)(e).

Very truly yours,

B. Kemp Haskell
Clerk

jm
cc: Hon. Dorothy Pierce, Clerk (369 and 368)

(Caption Omitted)

Order

March 8, 1968.

ORDERED that appellant's motion to recall mandate and reinstate appeal and motion to substitute counsel, filed February 14, 1968, is hereby denied.

(Signature omitted.)

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OCTOBER TERM 1968

NO. 82

HIRAM W. MORRIS, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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IN THE

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OCTOBER TERM 1968

NO. 82

HIRAM W. MORRIS, JR. Petitioner,

v.

STATE OF FLORIDA Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

OPINIONS BELOW

The decisions of the District Court of Appeal, Fourth District, dismissing Petitioner's Appeals are reported at 206 So.2d 286 and 207 So.2d 527. Denial of Certiorari by the Florida Supreme Court is reported at 211 So.2d 213.

JURISDICTION

This Court's lack of jurisdiction will be made to appear under the argument section of this brief.

QUESTIONS PRESENTED

POINT I

WHETHER THIS COURT HAS JURISDICTION UNDER TITLE 28, U.S.C., SECTION 1257?

POINT II

IS IT A DENIAL OF DUE PROCESS TO DISMISS PETITIONER'S CRIMINAL APPEAL FOR LACK OF PROSECUTION BY PETITIONER'S RETAINED COUNSEL, WHEN NO PERSONAL NOTICE WAS GIVEN TO PETITIONER OF SUCH INTENT, AND WHEN, UPON NOTIFICATION OF THE DISMISSAL, PETITIONER IMMEDIATELY RETAINED NEW COUNSEL AND OFFERED TO PROCEED?

APPELLATE RULE INVOLVED

Florida Appellate Rule 6.13, Dismissal of Appeal for Failure to Prosecute, provides as follows:

> "The appellate court may dismiss the appeal if the appellant does not prosecute it as required by these rules. When an appeal is dismissed, the clerk of the appellate court shall file with the clerk of the trial court a certified copy of the order of dismissal."

ARGUMENT

POINT I

THE COURT HAS NO JURISDICTION UNDER TITLE 28, U.S.C. SECTION 1257.

It is essential to the jurisdiction of the United States Supreme Court under Title 28, U.S.C. Section 1257, that a substantial Federal question has been properly raised in the State Court proceedings, **Beck v. Washington**, 369 U.S. 541. From the briefest review of Petitioner's motion to recall mandate and reinstate the appeal, it can be seen that no claim of deprivation of due process was presented to the District Court of Appeal, Fourth District.

This Court is without jurisdiction to consider alleged Federal questions where the state decision rests on an adequate state procedural ground in which the state has a valid interest, **Henry v. Mississippi**, 379 U.S. 443. The decisions herein obviously rest on the state procedural requirement that appeals be promptly prosecuted. The state interest is evident, to assure that if there is error, a new trial can be held before the case is completely stale.

POINT II

IT IS NOT A DENIAL OF DUE PROCESS TO DISMISS PETITIONER'S CRIMINAL APPEAL FOR LACK OF PROSECUTION BY PETITIONER'S RETAINED COUNSEL, WHEN NO PERSONAL NOTICE WAS GIVEN TO PETITIONER OF SUCH INTENT, AND WHEN, UPON NOTIFICATION OF THE DISMISSAL, PETITIONER IMMEDIATELY RETAINED NEW COUNSEL AND OFFERED TO PROCEED.

As Petitioner suggests, this Court has labored long and well to assure that indigents receive effective appellate review. This has been done by making protection of the indigent the duty of the state. Where protection is denied, the state is held accountable. Now, Petitioner urges this Court to provide

similar protection to a person who has hired his own attorney. This would be an unwarranted intrusion into a private relationship.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

By

CHARLES W. MUSGROVE
Assistant Attorney General
321 Pan-A Building
West Palm Beach, Florida

Counsel for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for a Writ of Certiorari to the District Court of Appeal, Fourth District, was furnished Honorable Richard Kanner, Counsel for Petitioner, 1150 N.W. 14th Street, Miami, Florida, this _____ day of _____, 1968.

CHARLES W. MUSGROVE

of Counsel